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No. 86-968

IN THE

Supreme Court Of The United States

October Term, 1986

GENEVA COUNTY BOARD OF EDUCATION,
Petitioner,

v.

MARYANN H. HIDLE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In view of the fact that the question presented by the Petitioner concerning jurisdiction of the district court was not decided by the Court of Appeals, should this Court grant *certiorari* to review such an undecided question?

2. In view of the fact that the Court of Appeals did not decide that district courts lack the jurisdiction to reverse their own judgments *sua sponte* but only decided that in the unusual circumstances of this one case the district court abused its discretion, is there any possible conflict with the law of the Fourth Circuit which has never decided this issue?

3. In view of the fact that the defendant's articulated reasons for its treatment of the plaintiff were found by the district court to be pretextual and unworthy of credence and the defendant never suggested that this was error or otherwise challenged the resulting judgment against it, did the Court of Appeals correctly hold that the district court abused its discretion by *sua sponte* reversing the plaintiff's judgment seven months after it was entered because of an erroneous belief that the same reasons that were already rejected as unworthy of credence could be nonetheless credited under the guise of deciding whether the same decision would have been reached in the absence of the pervasive sex discrimination found to exist?

4. Is a determination that the district court abused its discretion controlled by the "clearly erroneous" standard of F. R. Civ. P. 52 (a) when that determination is based solely on questions of law and the policies which favor the finality of judgments?

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STATEMENT OF THE CASE

This lawsuit was timely filed on March 28, 1983 alleging that the defendant had established a pattern and practice of "[f]avoring males over females in its hiring for supervisory and administrative (specifically, Assistant Principal) positions, and particularly by denying employment as an Assistant Principal to plaintiff because of [her] sex." After trial, the district court found that the defendant violated Title VII of the Civil Rights Act of 1964 by refusing to hire the plaintiff for an Assistant Principal's position because of her sex. A.1-11 & 13.

The district court concluded, however, that the plaintiff should receive injunctive relief but not back-pay because the

plaintiff failed to prove her interim earnings after the date she was rejected for hire.

The defendant filed no post-trial motions challenging the judgment entered against it, but the plaintiff filed a motion which was directed solely at the issue of remedies. The plaintiff's motion pointed out to the district court that she had in fact proven her back-pay through documentary exhibits received in evidence at trial. At a hearing on the plaintiff's Motion To Alter and Amend Judgment, *both parties* were permitted to offer additional evidence on the back-pay issue. Out of an abundance of caution, the plaintiff *reproved* the amount of pay she would have received from the defendant and proved the interim earnings she had received since she was rejected by the defendant, even though she contended the defendant carried the burden of proof on the latter issue. (Tr. 220-237). The defendant offered no evidence at the hearing. At the close of the hearing, District Judge Varner stated that it was his decision to "leave [the original decision] as it is". (Tr. 238). Judge Varner explained his decision as follows: "I think equity requires that I give her something, but I don't think it requires giving her that much". (Tr. 238-239). He then denied *all* back-pay and attorney's fees, but left the injunction standing. (Tr. 238-239).

Five months later a formal Opinion and Order was entered. (A. 13-18). Even though the defendant had not filed any post-trial motions or challenges to the judgment entered against it, the district court *sua sponte* reversed its original judgment and ruled entirely in the defendant's favor. Although the district court continued to insist that the burden was on the plaintiff to prove interim earnings, that ruling became academic when the court went further and held that the plaintiff was not entitled to prevail even on the issue of liability. (A. 13-18). The court reasoned that it had failed in the original finding of sex discrimination to apply the *Mt. Healthy* "same decision" test. (A. 13-18). In fact, however, the original findings explicitly recited the *Mt. Healthy* standard and implicitly applied it by holding that the defendant's articulated reasons for the plain-

tiff's treatment were pretextual and unworthy of credence. (A. 1-11). Thus, there were no "mixed motives" because the defendant's explanation for its motives were rejected (A. 13-18). Even though the defendant had never raised the *Mt. Healthy* issue *at any point* in the history of the case, the district court resurrected this question *sua sponte* on the mistaken belief that the *Mt. Healthy* issue was an independent element of proof which allowed the trial court to credit facts and reasons which had already been found to be discredited as pretextual and unworthy of credence in the same case.

The respondent filed a timely appeal. The Court of Appeals found that the present case was "an unusual if not unique case". (A. 22). The Court below stated that "[b]ecause of the rarity of this situation we do not attempt to lay down a rule concerning the power of the Court to act at all to alter or amend a judgment to the benefit of non-moving party when the moving party has sought to alter or amend under F. R. Civ. P. 59 (e). Rather, assuming the district court has such power, we conclude that in this case it abused its discretion." (A. 23-24). The Court of Appeals held that, in the limited context of this case, the strong policy considerations in favor of the finality of judgments, and the avoidance of disincentives to the correction of error in the trial courts, required that the original judgment entered in the plaintiff's favor not be disturbed *sua sponte* in the absence of a challenge to that judgment from the defendant itself. (A. 23-24).

On remand, the original trial judge recused himself because he believed that the plaintiff's attorney had deliberately failed to prove the plaintiff's interim earnings in an effort to deprive the defendant of an opportunity to prove such earnings. (A. 30). The district court ignored the fact that plaintiff had proven her interim earnings prior to the appeal through her testimony and the introduction of her tax returns during the hearing on August 28, 1984. (Tr. 220-237). Nevertheless, the original district judge recused himself because of his bias and his mistaken belief that he was compelled to award the plaintiff back-pay without deduction of interim earnings as a result

of the Court of Appeals' decision. (A. 30). The new district judge assigned this case promptly resolved this mistaken belief by entering an order which allowed the defendant to deduct the full interim earnings of the plaintiff. This Order was omitted by the defendant's Petition but is attached hereto in the Supplemental Appendix. The defendant's repeated references to the original district judge's mistaken belief that the plaintiff's attorney had deliberately failed to prove the plaintiff's interim earnings is misleading without the additional fact that the new district judge allowed the deduction of all interim earnings on the basis of the proof of such earnings *by the plaintiff's attorney before the appeal.* (Supp. App.; Tr. 220-237).

FACTS

The petitioner has had a longstanding pattern and practice of selecting males and rejecting females for administrative and supervisory positions. In the district court's original findings of fact, a pattern and practice of favoring males and disfavoring females in the selection of administrators and supervisors was found to exist. (A. 10 & 13). In the Opinion entered after the original judgment, the district court adhered to its original finding by holding that "the preponderance of the evidence, in the opinion of this court, demonstrates that the defendant has been discriminating against females in the appointment of their administrative and supervisory employees". (A. 18).

It is a stipulated fact in this case[1] that the defendant's decisionmaker, Mike Whittaker, admitted that he preferred to have a man rather than a woman in the position of Assistant Principal at the Hartford School". Agreed Fact # 34. This is

[1]The Pretrial Order required the parties to exchange statements of fact which they proposed to prove at trial and to stipulate to as many of such facts as possible. (R. 1-127). As a result of this procedure, the parties filed a Statement of Agreed Facts which listed 219 separate facts which the "parties have jointly stipulated . . . are true and correct for purposes of this litigation and may be taken as established without need for further proof by any party". (R. 1-131). These stipulated facts are cited in the body of this Brief as "Agreed Facts #___.". References to the trial transcript are cited as "Tr. _____".

one of the three Assistant Principal vacancies sought by the plaintiff. The other two vacancies sought were at the Coffee Springs School and the Samson School. Agreed Facts ## 4, 11-35, 128-169b; Tr. 44-51, 24-26, 208-209.

Males were selected for all three of the Assistant Principal vacancies sought by the plaintiff. *Id.* It is a stipulated fact that the defendant's decisionmakers did not believe or contend that the males selected were better qualified than the plaintiff. Agreed Facts ## 134-139, 26-30, 164-170, 151-158. The defendant never articulated any reason for selecting the male candidates and rejecting the female candidates for the Coffee Springs and Samson vacancies. *Id.* The decisionmakers in the filling of such vacancies never testified, and no proof of their reasons for the selection of the male candidates was ever offered or received. Neither did the district court ever find what the reasons for the plaintiff's rejection for these vacancies might have been.

As to the Hartford vacancy, the district court found that the plaintiff "was discriminated against because of her sex when a male teacher was selected as Assistant Principal". (A. 13 & 10). The district court stated that "the reason for this determination was that, while both applicants were well qualified" for the job, the plaintiff was educationally better qualified than the successful applicant and that, while most of the employees of the Geneva County Board of Education are female, only one of the principals and Assistant Principals are women". (A. 13).

The defendant stipulated that the plaintiff was fully qualified for the Assistant Principal vacancy at Hartford. Agreed Facts ## 28, 30-32, 11-14, 134-139, 164-170; Pl. Ex. # 7 & # 13; Tr. 24-26, 44-45, 208-209, 178-179, 170-171. The defendant contended, however, that the male selected, Franklin Lee, was better qualified. The stipulated facts showed the following on this contention:

> 1. The plaintiff had the Master's Degree in Supervision and Administration required by the State of Alabama for all Assistant Principals, but Franklin Lee did not. Agreed Facts ## 79-84, 76, 14, 28; Tr. 26-33.

2. The plaintiff had the Certification in Administration and Supervision mandated by the State of Alabama and the accreditation standards of the Southern Association of Colleges and Schools, but Franklin Lee did not have such certification. Agreed Facts ## 79-84, 28, 76; Pl. Exh. ## 5, 4, 3, 6 & 18; Tr. 26-33, 95, 98, 207-208, 210-211. Code of Alabama, Section 16-23-1 (1975) (Requires that no person be hired without requisite certificate from State Superintendent of Education.).

3. The plaintiff had the required educational degrees and certifications in elementary education, including a Master's Degree in the latter field, but Franklin Lee had only a Bachelor's Degree in secondary education. (A. 6; Agreed Facts ## 14, 76, 79-84). The vacancies in question were in elementary schools and required elementary degrees and certifications. *Id.*

4. The plaintiff had six years prior experience as a teacher in the elementary grades, but Franklin Lee had *none* other than three months as a substitute. Agreed Facts ## 73-74, 11-14, 94, 76; Tr. 103-104, 197. The State of Alabama required that all Assistant Principals have at least three years prior teaching experience in the public schools. (Agreed Fact # 14; Tr. 213-214, 30, 103, 135; Pl. Ex. # 35, p. 28).

The defendant did not present any evidence of objective qualifications which made Franklin Lee more qualified than the plaintiff. The district court found that "the plaintiff was educationally better qualified than the successful applicant", Franklin Lee. (A. 13 & 6). The defendant premised its claim that Lee was better qualified on purely subjective factors of being a good "leader" and "disciplinarian". The district court found that the defendant had established "no . . . objective criteria to be utilized in selecting assistant principals among candidates". (A. 10). The district court also found that the defendant's decisionmaker, Mr. Whittaker, had testified, while describing his desire for a "strong disciplinarian", that they "wanted a man" for the Hartford vacancy because the majority of the faculty were women. (A. 8; Agreed Fact # 34).

The subjective qualities of being a "leader" and a "strong disciplinarian" were not at all clearcut in Lee's favor. The de-

fendant stipulated that it had no reason "to doubt that the plaintiff had sufficient leadership abilities to be an Assistant Principal for the defendant". (Agreed Facts ## 29, 29, 30; Tr. 194.). The plaintiff had exhibited leadership in her school, community and church - related activities. (Tr. 36-39; 191-192; Agreed Facts ## 187-193). The defendant stated that Lee had demonstrated leadership while he was a substitute teacher for three months, but the defendant stipulated that during this period he did not exercise any of the normal functions and duties of an Assistant Principal. (Agreed Facts ## 96-98; Tr. 84, 120).

The defendant also made reference to the plaintiff leaving her teaching job in January, 1982 because of her husband's transfer to Florida. The evidence was undisputed, however, that the plaintiff never sold her home in Hartford and that by April she had returned and applied for the upcoming vacancies in the various Assistant Principalships. (Tr. 45-50, 74, 77-79; Agreed Facts ## 22-25).

The district court found that the reasons articulated for the plaintiff's rejection as Assistant Principal were pretextual and unworthy of credence and, on this basis, entered judgment in her favor. (A. 10-13). After the district court learned that this finding required an award of back-pay and that, contrary to its original belief, back-pay had been proven at trial, the district court then reversed itself and held that the *same reasons* which it had earlier rejected as pretextual and unworthy of credence would have resulted in her non-selection even in the absence of the sex discrimination it found to exist. (A. 13-18).

REASONS FOR DENYING THE WRIT

The primary question presented here was not even decided in the court below. A finding of an abuse of discretion was all that was decided, and this was limited to the "unusual if not unique" circumstances of this case. This Court does not ordinarily review questions that are not decided below. The limited holding of an abuse of discretion does not conflict with

decisions in any other Circuit. Even if the question concerning the authority of a district court were decided below the decisions that the defendant relies upon from the Fourth Circuit do not stand for the proposition that a Court can reverse a judgment any time that it desires to do so without a motion from the party against whom the judgment was entered. Congress limited the court's *sua sponte* powers to the period ten days after entry of a judgment when it enacted F. R. Civ. P. 59 (d). After that 10 day period, the finality of a judgment can only be interrupted on a motion by the party against whom it is entered. Without such a motion, no manifest injustice can occur by preventing the district court from *sua sponte* reversing the judgment since the party against whom it was entered has not spoken against it. The defendant never challenged the original judgment under *Mt. Healthy* or any other basis. The district court correctly held that it was an abuse of discretion for the district court to raise the latter case *sua sponte* because it is only applicable to cases involving "mixed motives" and not to cases where the defendant's explanation of its motives have already been found to be pretextual and unworthy of credence.

I. The Questions Presented By The Petitioner Were Not Decided Below.

The first two questions presented for review by the defendant-petitioner concern the jurisdiction or authority of a district court to reverse a judgment seven months after it was entered when the party against whom it was entered never filed a motion or otherwise challenged the correctness of the judgment. These questions are not properly presented because the Court of Appeals did not decide the issue against the defendant-petitioner. (A. 23). The Court of Appeals plainly stated that "[b]ecause of the rarity of this situation we do not attempt to lay down a rule concerning the power of the court to act at all to alter or amend a judgment to the benefit of a non-moving party when the moving party has sought to alter or amend under F. R. Civ. P. 59 (e). Rather, assuming the

district court has such power, we conclude that in this case it abused its discretion". (A. 23).

It is well settled that "ordinarily this Court does not decide questions not raised or *resolved* in the lower court". *Youakim v. Miller,* 425 U.S. 231, 234 (1976). (emphasis supplied). See also, *Duigan v. United States,* 274 U.S. 195, 200 (1927) ("It is only in exceptional cases coming here from federal courts that questions not pressed or passed upon below are reviewed".). There can be no exceptional circumstances when the lower appellate court assumes *arguendo* that the question would be decided in the petitioner's favor, but then holds that the district court abused its discretion in exercising the authority it was assumed to possess. In that circumstance, the petitioner would still not gain the relief it seeks even if the question presented were resolved in its favor because the decision below did not turn on that question.

Thus, there is nothing to decide in the current case concerning the general power of the district court to do what it did, but instead there is only the very narrow issue of whether it abused its discretion in the "unusual if not unique" circumstances of this case. The petition does not assert that the determination of an abuse of discretion is worthy of a grant of *certiorari* and this issue is not among the four questions presented.

II. There Is No Conflict Among The Circuits.

The defendant's suggestion of a conflict between the current case and that of two cases in the Fourth Circuit is incorrect for two reasons. First, as already pointed out, the current case only involves an abuse of discretion in the "unusual if not unique" circumstances of this one case. (A. 22-23). A finding of an abuse of discretion in one case does not conflict with a general principle of law in another case when the latter principle is expressly assumed *arguendo* to be true. That is what happened herein. The Court of Appeals assumed, without deciding, that the district court has the discretion to do what it did, so long as it did not abuse that discretion. There is nothing in the two

Fourth Circuit cases cited by the petitioner which even remotely suggests a conflict among the Circuits on this point.

Secondly, even if the Court of Appeals had held that the district court did not have the discretion to *sua sponte* reverse a judgment when the party against whom it was entered did not challenge that judgment, that decision would not conflict with the two Fourth Circuit cases relied upon by the defendant-petitioner. In neither of the Fourth Circuit cases was this question presented or decided. In *United States v. Hollis,* 424 F.2d 188, 191 (4th Cir. 1970), the decision was limited to the context of granting relief *to the party filing a motion* for new trial on grounds not asserted in the motion. The decision did not decide that the court can grant relief from a judgment in favor of the party against whom the judgment is entered when such party has not filed a motion or otherwise challenged the judgment against it. Neither is the latter question presented or decided in *United States v. Jacobs,* 298 F.2d 469, 473 (4th Cir. 1961), where *both parties* "filed motions seeking modification of the judgment" and the Court simply ruled that the trial court was not restricted to the particular modifications suggested by the parties.

The two decisions are of no precedential value in deciding the much different issue of whether a trial court can reverse a judgment seven months after it was entered when the party against whom it was entered has not sought such a reversal. As the Court of Appeals correctly noted, the reversal of such a judgment when the only motion filed has been by the party obtaining the judgment "inhibits the error-correcting function of a Rule 59 (e) motion". (A. 23). Appeal would automatically result from every adverse ruling on remedies because "a successful plaintiff given a less-than-complete remedy could not ask for correction without putting at risk the judgment in her favor though the party cast in judgment has raised no question of the validity of the judgment". (A. 23). Thus, Rule 59 and Rule 60 would become dead letters for use by prevailing parties. Instead of presenting errors to the trial court through the latter rules and risking loss of the judgment itself the prevail-

ing party will be compelled to let the ten days under F. R. Civ. P. 59 expire so that the court's powers to reverse the judgment will expire with it. (A. 23).

Congress appeared to have similar concerns when it expressly restricted the Court's *sua sponte* powers to correct a judgment to the period ten days after the judgment was entered. See F. R. Civ. P. 59 (d). Under the latter rule the district court can only act on its own initiative within ten days after judgment.[2] After that, the Court's powers to correct error are limited to Rule 60 situations which require a motion from the party against whom the judgment was entered.[3]

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[2]See e.g., *Kain v. Winslow Mfg., Inc.*, 736 F.2d 606, 608 (10th Cir. 1984) ("Rule 59 (d) authorizes a district court to order a new trial on its own initiative for any reason for which it might have granted a new trial on motion of a party, but limits this authority by requiring such action to be taken within ten days after entry of judgment. Here the order of the district court granting Winslow a new trial was filed about thirteen months after entry of judgment. Hence, under Rule 59 (d), the district court's action was unauthorized".); *Tarlton v. Exxon*, 688 F.2d 973, 977-78 (5th Cir. 1982), *cert. denied sub. nom.*, 103 S.Ct. 3536 (1983) ("The time limit for filing a new trial motion imposed in Rule 59 (d) is mandatory and jurisdictional, it cannot be extended by the trial court. *** The language of Rule 59 (d) is explicit: the trial court may order a new trial for any reason it might have found sufficient on motion of a party, 'not later than 10 days after entry of judgment'. *** We conclude that absent a timely motion for a new trial, or an order by the trial judge within 10 days permitted by the Rule, the trial court was without jurisdiction to enter a *sua sponte order* for a new trial".); *Tsai v. Rosenthal*, 297 F.2d 614, 617 (8th Cir. 1961) ("Rule 59 (d) has been interpreted by the courts as conferring jurisdiction upon the trial court to act upon its own initiative only during the ten days immediately following the entry of judgment".); *Burnam v. Amoco Containers Co.*, 738 F.2d 1230 (11th Cir. 1984) ("As long as the court acts within ten days after the entry of judgment, the court has the power on its own motion to consider altering or amending a judgment".); *Gribble v. Harris*, 625 F.2d 1173, 1174 (5th Cir. 1980); *Flores v. Procunier*, 745 F.2d 338, 359 (5th Cir. 1984); *Fuente v. Central Elec. Coop, Inc.*, 703 F.2d 63, 65 (3rd Cir. 1983); *Peterman v. Chicago, Rock Island and Pacific R. Co.*, 493 F.2d 88, 91 (8th Cir. 1974); *Demerety v. Daniels Motor Freight, Inc.*, 307 F.2d 469 (3rd Cir. 1962); *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953); *Jackson v. Wilson Trucking*, 243 F.2d 212 (D.C. Cir. 1957).

[3]Rule 60, unlike Rule 59, does not have any provision for *sua sponte* altering a judgment except for "clerical mistakes" under Rule 60 (a). Substantive errors can only be corrected under Rule 60 (b) which re-

These restrictions on the court's *sua sponte* powers strike the proper balance between the compelling interests of the parties and society in the finality of judgments and the competing interest of avoiding erroneous judgments. After the ten day period under Rule 59 (d), the latter interests give way to the former unless the party against whom a judgment is entered files a motion under Rule 60 (b). The Court has no inherent or *sua sponte* powers after the 10 day period because it is assumed that no judgment could involve a manifest injustice sufficient to interrupt the finality of the judgment unless the party against whom the judgment is entered files a motion. In the absence of such a motion, the law assumes the correctness of a judgment that has been pending longer than 10 days and the interests in finality prohibit the trial court from *sua sponte* reversing such judgment.

In this context, the Eleventh Circuit correctly recognized that "strong policy considerations militate against what occurred here". (A. 23). In the words of the Court below, "the interest of the parties and society in the finality of judgments, and the legitimate expectation of the parties concerning the judgment to the extent it is not questioned by the parties, speak against pulling the rug from under the plaintiff eight months after she filed her motion to correct errors in the remedy granted her". (A. 24).

III. The Current Case Did Not Involve "Mixed Motives" Because The District Court Correctly Decided In The Original Findings That The Defendant's Articulated Reasons Were Pretextual And Unworthy Of Credence.

The defendant is incorrect in stating that the current case involved "mixed motives". The district court in the original

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quires a "motion" by the party seeking relief from the judgment. See e.g., *Warner v. City of Bay St. Louis*, 526 F.2d 1211, 1212 (5th Cir. 1976) ("In contrast, errors that affect substantial rights of the parties are outside the scope of Rule 60 (a). Such errors may be corrected under Rule 60 (b) if brought to the attention of the district court within the one year time limit".).

Opinion found that the reasons articulated by the defendant for selecting the male candidate were pretextual and unworthy of credence and, on this basis, entered judgment for the plaintiff.[4] (A. 1-11). The defendant never articulated any reasons for the plaintiff's rejection other than those which were held to be unworthy of credence in the original decision.[5] A case does not involve "mixed motives" if the reasons articulated by the defendant are rejected as pretextual and unworthy of credence. A "mixed motive" case is one in which the district court credits the defendant's articulated reasons, but also finds that sex or race discrimination played a role in the employment decision at issue. It is impossible to have a "mixed motive" case when, as here, the defendant's articulated motivation has been rejected as pretextual and unworthy of credence.

In structuring the question to be decided in the original decision, the district court specifically recognized that the plaintiff could only prevail if she established " 'that the stated reason for rejection was in fact a mere cover up for a discriminatory decision' ". (A. 2). This framework for deciding the ultimate issue was taken directly from *Texas Department of Community Affairs v. Burdine, supra,* 450 U.S. at 256, where this Court held that the plaintiff may prevail on the "ultimate" issue of intentional discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence". The current plaintiff

[4]The district court's original decision relied upon the analytical framework of *McDonnell Douglas v. Green,* 411 U.S. 792, 802 (1973), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 257 (1981), insofar as it structured the question to be decided in the original findings as whether "the legitimate reasons offered were not the true reasons but a mere pretext'. (A. 2). The district court in its original findings held that in order to prevail the plaintiff must prove " 'that the stated reason for rejection was in fact a mere cover up for a discriminatory decision". (A. 2).

[5]A comparison of the district court's original Opinion and original Judgment shows that the latter dealt with the exact same articulated reasons for the plaintiff's treatment which had been held pretextual in the original decision. *Compare* A. 1-11 *with* A. 13-18.

was held to have satisfied this burden in the original decision of the district court. (A. 1-11).

After deciding that the defendant's articulated explanation of its motive was pretextual and not the true reason for its treatment of the plaintiff, the district court erred by *sua sponte* reasserting those *same discredited reasons* as the basis for a ruling that the same decision to reject the plaintiff would have been made in the absence of sex discrimination already found to exist. The latter question was decided conclusively when the defendant's articulated reasons were found unworthy of credence under the *McDonnell Douglas - Burdine* analytical framework. The court cannot credit motivations under the guise of *Mt. Healthy* which have been discredited as pretextual under the *McDonnell Douglas - Burdine* analysis. This would accomplish nothing in reaching the ultimate issue in the case, *viz.* whether sex discrimination caused the plaintiff's rejection. The *Mt. Healthy* inquiry, to the extent appropriate to a race or sex discrimination case,[6] is put to rest when the district court finds under *Burdine* that "a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence". There is no comparable determination in a First Amendment case such as *Mt. Healthy* which precludes the possibility that the same decision would have been reached through a finding that the employer's reasons were pretextual and unworthy of credence.

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[6]One of the central concerns in *Mt. Healthy* was that an employer could use his First Amendment rights as a shield from a decision that would have been made for other reasons even in the absence of the exercise of such rights. 429 U.S. at 285-86. In a sex or race discrimination case, the chances of this type of defensive assertion of the protected characteristic is significantly lessened since race or sex are not mutuable characteristics which can be asserted at the whim of the employee in the same way as involved in First Amendment cases. More importantly, unlike the First Amendment plaintiff, the employee alleging race or sex discrimination must carry the burden of proving that the employer's articulated reasons were pretextual and unworthy of credence in order to establish such discrimination. As argued more fully above, this precludes the possibility that those discredited reasons could have caused the same decision to have been made even in the absence of the race and sex discrimination found to exist.

For these reasons, the district court abused its discretion in resurrecting the same reasons which it had already rejected as the basis for applying *Mt. Healthy*. Concerns about the application of *Mt. Healthy* were not the true reasons for the district court's *sua sponte* reversal of the original judgment for the plaintiff. The true reason for this unusual event was stated by the district court in the hearing of August, 1984. When the district court realized that it had overlooked the proof of back-pay at the original trial and that it would be necessary to award back-pay unless the findings of liability were overturned, the district court stated that it never would have ruled in the plaintiff's favor if it had known the amount of back-pay involved. (Tr. 238-239). It was in this context that the district court attempted to backtrack and to assert *Mt. Healthy* as an "overlooked" prong of the analysis necessary to decide the plaintiff's case. In fact, however, *Mt. Healthy* was not overlooked in the original decision, but was expressly cited at page two of such decision as authority for the necessity of deciding whether the plaintiff would have been rejected even in the absence of the sex discrimination found to exist. (A. 2). Obviously, the district court was incorrect in asserting that it had overlooked the *Mt. Healthy* inquiry in the original decision. Because a court cannot refuse to find liability merely because it disagrees with the amount of back-pay such a ruling would entail, an abuse of discretion was not hard to find and is fully supported by the record.

IV. The Clearly Erroneous Rule Did Not Apply To The Question Decided By The Court Of Appeals.

The defendant accuse the appellate court judges of "arrogance" in refusing to apply the "clearly erroneous" standard of Rule 52 (a) in its decision. The defendants fail to explain how the latter standard could be applicable to a determination that the district court abused its discretion. The very case it cites as evidence of "arrogance" holds that Rule 52 (a) does not apply to questions of law or to anything other than the trial court's factual findings. *Pullman Standard v. Swint,* 456

U.S. 273, 291-293 (1982). Rule 52 (a) says the same thing on its face. The district court did not reverse the trial court's findings of fact, but simply held that the trial court had abused its discretion in altering these findings *sua sponte* over seven months after they were entered. (A. 23-24). In this context, Rule 52 (a) did not apply and the only arrogance in the record is that of the defendant accuser in making such an unfounded charge.

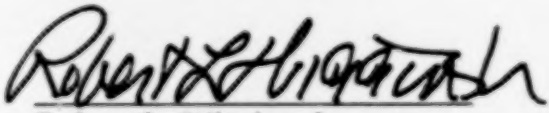
V. The Defendant Feigns Surprise That Back-Pay Was Claimed.

The defendant-petitioner argues that it did not know back-pay was claimed and this justified the district court's belated raising of *Mt. Healthy* on its own initiative. Pet., pp. 27-28. The defendant-petitioner fails to tell the Court that back-pay was explicitly claimed in the Complaint, was proven at trial and was reproven at the post-trial hearing in August, 1984. *At no point* in the trial court or the appellate court did the defendant ever claim that it was unaware of the claim of back-pay. That claim has been mentioned for the first time in this Court and is simply untrue.

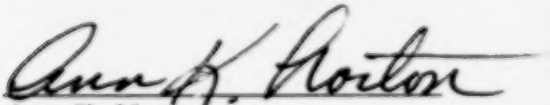
CONCLUSION

The current case is not one for which *certiorari* should be granted. The defendant has presented questions which were not decided by the Court of Appeals concerning the authority or the jurisdiction of the district courts to *sua sponte* reverse its own judgment outside the time limits provided by Congress for such action. The other questions presented were also not decided by the Court of Appeals except as a part of a determination that the district court abused its discretion in the "unusual if not unique circumstances" of this one case. The decision of the Court of Appeals on all of the points decided was unexceptional and did not conflict with the law of any other Circuit. For all of the reasons recited in this Brief, the Petition should be denied.

Respectfully submitted,



Robert L. Wiggins, Jr.



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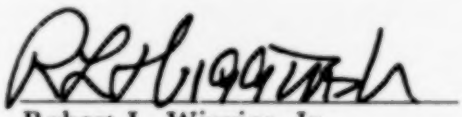
CERTIFICATE OF SERVICE

This is to certify that two copies of the above and foregoing have been served by United States mail, postage prepaid and properly addressed on Mr. Donald B. Sweeney, Jr., Attorney at Law, 1700 Financial Center, Birmingham, Alabama 35203 and Mr. Joseph P. Hughes, Attorney at Law, P. O. Box 10, Geneva, Alabama 36340.



Robert L. Wiggins, Jr.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA,
SOUTHERN DIVISION

MARYANN H. HIDLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 83-T-489-S
GENEVA COUNTY BOARD OF EDUCATION,	)	
	)	
	)	
Defendant.	)	

ORDER

This cause is before the court on two matters: (1) the defendant's October 20, 1986, motion for a stay pending appeal; and (2) determination of an appropriate backpay award. A hearing was held to consider these issues on October 21, 1986. For reasons that follow, the stay is due to be denied in part and granted in part, and backpay is to be calculated in accordance with general principles by determining the amount of potential earnings less interim earnings.

I.

On September 22, 1986, this court issued an order and injunction enforcing the mandate of the Eleventh Circuit that plaintiff Maryann Hidle be afforded relief from the sex-based discrimination inflicted upon her by defendant Geneva County Board of Education. The appellate court specified that such relief must include Hidle's immediate placement in the positions of assistant principal and teacher. This court ordered the injunctive relief specified, and continued the case for determination of further relief. The parties agree that backpay is due Hidle, and now ask the court to consider the appropriate amount due.

The contention between the parties regarding backpay concerns whether interim earnings of Hidle should be subtracted from the amount she potentially would have earned in salary, had the school board not discriminated against her. Under Title VII of the Civil Rights Act of 1964, relief should be designed to "make whole" the victim of employment discrimination by placing her in just that position she would have been in if she had not suffered discrimination. However, as in the case of a contractual breach, this requires the victim to mitigate financial harms by exercising reasonable diligence in finding alternative employment. 42 U.S.C.A. § 2000e-5 (g). Any earnings from such employment are then subtracted from potential earnings at the desired job in determining backpay. *Id.*

The school board does not allege that Hidle failed to use reasonable diligence to mitigate her loss of earnings. They merely argue that the amount of her interim earnings must be considered now in assessing her entitlement to backpay. Hidle argues that in this instance interim earnings should not be considered because the school board failed to assert timely that her backpay award would be diminished by the amount of those earnings.

While the court acknowledges that Hidle is correct in her claim that the burden is upon the school board to establish any offsets to backpay, at this point the court's primary concern is to see the just and expeditious resolution of this case. The law is quite clear in regard to the proper procedure for calculation of backpay awards. Reasonable diligence in mitigation is required and there is no question that Hidle has met this standard. There is no reason for the introduction of further irregularities into this already unusual case. In the court's view the fairest resolution for both parties is to award backpay less interim earnings.

Hidle offers the figures contained in plaintiff's exhibit #1, filed October 7, 1986, for determination of her potential earnings. Although the school board now offers an altered set of figures on potential earnings, the court notes that Hidle's figures are based upon calculations of the defendant. As both

parties previously agreed to the accuracy of Hidle's figures, the court will adopt them for calculation of potential earnings. The amount of interim earnings for the years 1982 through 1986 are set forth in plaintiff's exhibit #1, filed October 21, 1986. Based upon these figures and calculations, Hidle is entitled to receive a backpay award calculated in the manner set forth in the October 21 exhibit, but substituting the base backpay figure of $87,956 contained in the October 7 exhibit, for that of $85,812.

II.

The school board asks the court to stay its order of injunctive relief, entered September 22, 1986, and already effectuated, as well as the above-determined award of backpay. The court is of the opinion, and, indeed Hidle agrees that the backpay award should be stayed. However, the injunctive relief ordered and implemented will not be stayed. Two factors require that the injunction remain in effect.

First, the law of the Eleventh Circuit provides that once a determination has been made that discrimination has occurred, the infliction of irreparable harm is presumed. *Middle-Keirn v. Stone,* 655 F.2d 609, 612 (5th Cir. September 8, 1981) (Unit B). Therefore any delay or gap in provision of injunctive relief from discrimination would cause harms that could not be remedied through provision of relief at some later date. In the court's view, this is particularly true in the context of a school setting, where it seems likely that an administrator's authority could be impaired by introduction into his or her administrative position late in the school year. Moreover, in this particular case, Hidle's authority as assistant principal would undoubtedly be undermined if the status quo is disturbed by her abrupt removal from the position she has so recently assumed. Should she later be reinstalled in that position upon denial of the school board's petition for writ of certiorari, it would clearly be difficult for her to reestablish the authority and respect due her position.

Second, it is not within this court's power to stay the injunctive relief provided Hidle. It was the mandate of the Eleventh Circuit Court of Appeals that required the school board to place Hidle in the assistant principalship and teaching position she now holds. That mandate has not been lifted. The school board cites two rules delineating a court's authority to stay an injunction pending appeal. Fed.R.App.Proc. 41 (b) and Fed. R.Civ.Proc. 62 (g). But both of these provisions are directed at appellate courts. Where, as here, the district court acted only to implement the mandate of the appellate court, the authority of the above rules cannot be invoked to alter the decision of the appellate court in any way.

In accordance with the reasons given above, it is the ORDER, JUDGMENT, and DECREE of the court:

(1) That plaintiff Maryann H. Hidle have and recover from defendant Geneva County Board of Education backpay calculated as set forth in this order;* and

(2) That defendant Geneva County Board of Education's October 20, 1986, motion for a stay pending appeal is granted as to backpay and is denied in all other respects.

DONE, this the 23rd day of October, 1986.

/s/ MYRON H. THOMPSON
United States District Judge

*So as to make the record complete, the court asks that within seven (7) days from the date of this order the parties are to file a joint statement reflecting Hidle's backpay as set forth in the memorandum opinion.